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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF NEVADA

4 Pacira Pharmaceuticals, Inc.,

5 Plaintiff

6 v.

7 Research Development Foundation,

8 Defendant

Case No. 2:21-cv-02241-CDS-NJK

Order Resolving RDF's Motion in Limine to  
Exclude Opinions and Testimony  
of Brian P. Jenkins

[ECF No. 222, 253]

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10 Plaintiff Pacira Pharmaceuticals, Inc. sues defendant Research Development Foundation  
11 ("RDF") in this declaratory judgment action arising out of a long-standing assignment  
12 agreements between the parties. RDF filed a motion in limine seeking to exclude parts of the  
13 expert testimony of Pacira's expert witness Brian P. Jenkins. RDF motion, ECF No. 222 (sealed);  
14 ECF No. 253 (unsealed). Pacira opposes the motion. Opp'n, ECF No. 261. RDF filed a reply to  
15 Pacira's opposition. RDF Reply, ECF No. 284. For the reasons described herein, I grant in part  
16 and deny in part RDF's motion in limine to exclude the testimony of Dr. Jenkins.

17 **I. Legal standard**

18 The court incorporates the motion in limine standard set forth in the order resolving  
19 Pacira's motions in limine to exclude, ECF No. 307.

20 **II. Discussion**

21 As background, the issues that remain outstanding for trial are: (1) "whether Pacira's  
22 New Patents 'relate to the Assigned Proprietary Property' under Section 3.8 of the 1994  
23 Agreement[.]" ECF No. 232 (citing ECF No. 178 at 6); ECF No. 264 at 4 (citing Summ. J. Order,  
24 ECF No. 152 at 17-18), and (2) unenforceability of the assignment agreements on the grounds of  
25 unconscionability and public policy, ECF No. 232 at 6.

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1 In his expert report, Jenkins discusses RDF's royalty revenues related to Pacira as a  
 2 percentage of RDF's total royalty revenues; compensation paid to RDF representatives Thomas  
 3 J. Brorby, Dudley R. Dobie, and Brian W. Crozier by RDF and related organizations; and fees  
 4 incurred by the law firm of Brorby, Crozier & Dobie, P.C. for legal services provided to RDF and  
 5 related organizations. *See* Jenkins rep., ECF No. 253-2. RDF seeks exclusion of Jenkins's report  
 6 and testimony arguing that his report does not assist the trier of fact and is irrelevant to the  
 7 remaining issues set for trial. ECF No. 253 at 7-19.

8 **A. Whether Jenkins's report assists the trier of fact<sup>1</sup>**

9 RDF argues first that Jenkins's report essentially boils down to three tables which  
 10 summarize information available to the factfinder and for which he conducts only basic addition  
 11 and division. *Id.* at 7. It contends that the conclusions he offers could be drawn by a layperson  
 12 and require no specialized skills. *Id.* at 13 (citing *Ga. Operators Self-Insurers Fund v. PMA Mgmt. Corp.*,  
 13 143 F. Supp. 3d 1317, 1338 (N.D. Ga. 2015) and *Isr. Travel Advisory Serv. v. Isr. Identity Tours*, 1993 U.S.  
 14 Dist. LEXIS 13749, at \*4-6 (N.D. Ill. Sep. 15, 1993)). In its response, Pacira argues that Jenkins's  
 15 opinions are helpful because, even if the outputs require only simple addition and division,  
 16 Jenkins's inputs were complicated and required significant experience and expertise. ECF No.  
 17 261 at 15-20. Pacira contends that, (1) for his royalty reports, Jenkins reviewed thousands of  
 18 pages of forms to put together a picture of RDF's royalty revenue; (2) for his table analyzing  
 19 RDF payments to Brorby, Crozier, and Dobie, he was required to derive annual compensation  
 20 paid to each RDF Trustee for the period from 2001 through 2020; and (3) for his legal fees table,  
 21 he compiled and analyzed tax returns from five entities across nineteen years. *Id.* at 16-18.

22 "Whether the situation is a proper one for the use of expert testimony is to be  
 23 determined on the basis of assisting the trier" and "[t]here is no more certain test for  
 24 determining when experts may be used than the common sense inquiry whether the untrained  
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26 <sup>1</sup> As the parties are aware, because this is a bench trial, I will be serving as the trier of fact.

1 layman would be qualified to determine intelligently and to the best possible degree the  
2 particular issue without enlightenment from those having a specialized understanding of the  
3 subject involved in the dispute.” Fed. R. Evid. 702 advisory committee’s note (citations omitted).  
4 However, an expert report that relies on relatively simple calculations may nonetheless assist  
5 the trier of fact where the basis for these calculations is “more involved[.]” *Relevant Grp., LLC v.*  
6 *Nourmand*, 2022 WL 18356631, at \*4 (C.D. Cal. Dec. 9, 2022); *cf. SiteLock LLC v. GoDaddy.com LLC*,  
7 562 F. Supp. 3d 283, 331 (D. Ariz. 2022) (finding that even though an expert was only making a  
8 “simple math calculation[.]” it could still be useful to the trier of fact).

9 I find that, even though Jenkins only conducts addition and division in his calculations,  
10 his expertise as an accountant is essential in both reaching and evaluating those calculations;  
11 especially calculations that involve calculations that span over the course of nineteen years.  
12 Although a layperson could find an average, a layperson would not have been able to evaluate  
13 the thousands of documents upon which Jenkins relied to synthesize the numbers he calculated.  
14 Accounting experts, especially, are often asked to synthesize heavy evidentiary records and  
15 excluding their reports and testimony as unhelpful because their ultimate calculations are  
16 “simple” misunderstands the value of their expertise. Therefore, RDF’s motion to exclude  
17 Jenkins’s testimony because it is unhelpful to the trier of fact is denied without prejudice.

#### 18 B. Relevance of Jenkins’s report

19 RDF argues that all parts of Jenkins’s report are irrelevant.

##### 20 1. *Pacira royalty revenue opinions*

21 RDF first argues that Jenkins’s Pacira royalty revenues opinions are irrelevant because  
22 they do not serve to address the question of whether the ’495 patent and the ’572 or ’838 patents  
23 are related, and are frivolous to any bias question because, although a fact witness could testify  
24 that RDF receives royalties from Pacira, the amount in royalties is irrelevant. ECF No. 253 at 14–  
25 15. It expresses concern that this bias testimony will lead to a “mini-trial on, or an attempt to  
26 quantify, a party’s or its representative-witnesses’ inherent partiality.” *Id.* at 15 (citing *Dent v. U.S.*

1 *Tennis Ass'n*, 2010 U.S. Dist. LEXIS 31052, at \*2–3 (E.D.N.Y. Mar. 30, 2010)). In response to this  
 2 contention, Pacira argues that Jenkins’s testimony is relevant because it demonstrates RDF’s  
 3 “significant financial stake in the outcome of this litigation[,]” which would not come to light  
 4 otherwise. ECF No. 261 at 21. Additionally, it argues that the royalty revenue opinions are  
 5 relevant to the substantive unconscionability question, “as it speaks to the ‘one sidedness’ of the  
 6 contract under RDF’s ‘harsh’ and ‘unreasonable’ interpretation.” *Id.* at 22. (citing *D.R. Horton, Inc.*  
 7 *v. Green*, 96 P.3d 1159, 1163–64 (2004) (“substantive unconscionability focuses on the one-  
 8 sidedness of the contract terms.”) (quoting *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir.), *cert. denied*,  
 9 540 U.S. 811 (2003))).

10 I agree that Jenkins’s opinions about the Pacira royalty revenue are relevant. Evidence of  
 11 potential bias, as well as the extent of that bias, may be relevant. *See, e.g., Heath v. Cast*, 813 F.2d  
 12 254, 259 (9th Cir. 1987) (finding that factfinder was “entitled to hear the evidence and decide  
 13 the extent of that bias”); *see also United States v. Abel*, 469 U.S. 45, 52 (1984) (“Proof of bias is  
 14 almost always relevant because the jury, as finder of fact and weigher of credibility, has  
 15 historically been entitled to assess all evidence which might bear on the accuracy and truth of a  
 16 witness’ testimony.”). I see no reason to exclude this evidence just because Jenkins not only  
 17 opines about potential bias, but also supports his conclusions with data. As to the issue of  
 18 unenforceability based on unconscionability, I likewise find that Jenkins’s opinions about the  
 19 percentage of RDF’s royalty revenue derived from Pacira are relevant. His testimony does not  
 20 invite a “mini-trial” on the level of bias as RDF contends because RDF does not dispute Jenkins’s  
 21 methodology or his accuracy. Therefore, RDF’s motion to exclude Jenkins’s testimony about the  
 22 royalty revenues as irrelevant is denied without prejudice.

23 However, Pacira is reminded that this trial is about the triable issues—the “related to”  
 24 and unenforceability questions—and, as rulings on motions in limine are only preliminary,  
 25 should testimony about or issues of bias become all-encompassing, I will not hesitate to impose  
 26 limitations during trial.

1                   **2. Compensation paid to Thomas J. Brorby, Dudley R. Dobie, Brian W.**  
 2                   **Crozier by RDF and related organizations**

3           RDF next argues that Jenkins’s testimony as to compensation of Brorby, Dobie, and  
 4 Crozier is irrelevant for demonstrating witness bias because, though the *fact* of compensation is  
 5 relevant, the *amount* of compensation is not. ECF No. 253 at 16. In response, Pacira argues that  
 6 amount of compensation is relevant to establish bias. ECF No. 261 at 22–23. It also argues that  
 7 “[s]imply knowing that Mr. Brorby and Mr. Crozier are trustees of RDF that receive  
 8 compensation is insufficient to establish the extent of their bias and credibility” because it fails  
 9 to capture the extent of their monetary relationship with RDF and their corresponding stake in  
 10 the case. *Id.* at 23–24. Pacira does not argue that Jenkins’s findings regarding Dobie should not  
 11 be excluded. *See* ECF No. 261 at 22–24.

12           The parties each point to case law addressing similar situations that supports their  
 13 respective arguments. *Compare, e.g., Johnson v. Hewlett-Packard Co.*, 2010 U.S. Dist. LEXIS 122161, at  
 14 \*6 (N.D. Cal. Nov. 1, 2010) (holding that discovery regarding amount of compensation was  
 15 irrelevant because “Slaby’s employment with HP already implies bias, and thus, exact  
 16 information as to amounts of compensation is unnecessary for such a purpose”), *with Oracle USA,*  
 17 *Inc. v. Rimini St., Inc.*, 2015 WL 5089779, at \*3 (D. Nev. Aug. 27, 2015) (denying motion to exclude  
 18 CEO’s “net worth in [defendant] stock” because it was “relevant to establish his bias.  
 19 [Defendant] has publicly stated that the outcome of this case may have a material impact on its  
 20 value. As such, defendant [CEO] has a direct financial stake in the outcome of this case and  
 21 [plaintiff] is entitled to examine any testimonial bias during trial.”).

22           I find the *Oracle* court’s reasoning more persuasive; amount of bias can be a relevant  
 23 inquiry. *See Wyatt Tech. Corp. v. Malvern Instruments, Inc.*, 2010 WL 11505684, at \*23–24 (C.D. Cal.  
 24 Jan. 25, 2010) (refusing to exclude salaries and dividends paid to witnesses because “income  
 25 flowing directly from [plaintiff] as a company” to the company executive witnesses “is relevant  
 26 to their possible bias as witnesses in this case[.]”). Although the fact of compensation serves as

1 the primary relevant fact to demonstrate a witness's bias, how much the witness is being paid or  
 2 has been paid by a party can further fill in the picture of how much the witness stands to gain  
 3 should their side prevail at trial. Here, the amount of compensation Brorby and Crozier have  
 4 received from RDF and related organizations is relevant to the question of how significant their  
 5 stake in the outcome of this trial will be. Therefore, RDF's motion to exclude Jenkins's  
 6 testimony about the amount paid to Brorby and Crozier because it is irrelevant is denied  
 7 without prejudice.

8 Because Pacira's response does not object to—or even mention—Jenkins's findings as to  
 9 Dobie, I find that Pacira has waived the argument that Jenkins's testimony regarding Dobie is  
 10 relevant. *Stiffarm v. City of Pullman*, 2007 WL 9717343, at \*1 (E.D. Wash. Mar. 6, 2007) (finding  
 11 that a failure to address parts of a motion in limine amount to a concession). Accordingly, RDF's  
 12 motion to exclude Jenkins's testimony about the amount paid to Dobie because it is irrelevant is  
 13 granted.

14 ***3. Fees incurred by the law firm of Brorby, Crozier & Dobie, P.C. for legal***  
 15 ***services provided to RDF and related organizations***

16 RDF states that Jenkins's opinions about the payment the law firm Brorby, Crozier &  
 17 Dobie, P.C. (at which Brorby, Crozier, and Dobie are all partners) received will be presumably  
 18 used to demonstrate that Brorby, Dobie, and Crozier were further compensated by RDF in this  
 19 litigation. ECF No. 253 at 17. It argues that the implication that the three were inappropriately  
 20 compensated is false and the only way to defend against this accusation will be for RDF to put  
 21 on a large collection of evidence to show that the partners appropriately billed for their time and  
 22 could separately encroach on attorney-client privilege. *Id.* It also suggests that this evidence  
 23 showing witness bias is cumulative. *Id.* at n.2. Pacira argues in response that evidence of the  
 24 longstanding relationship between Brorby, Crozier & Dobie, P.C. and RDF, and the millions of  
 25 dollars that have been paid to the firm in that time, is relevant in this case where at least Brorby  
 26 and Crozier are billing for their time as fact witnesses. ECF No. 261 at 24–25. Pacira asserts that

1 it “is not suggesting that RDF is paying Brorby Crozier & Dobie P.C for work that it has not  
2 done” and therefore there is no need for a “sideshow” that would require RDF to put on proof of  
3 what its fact witnesses were billing for. *Id.* at 25 n.13.

4 For the same reasons I found that the evidence of RDF’s direct compensation to the  
5 witnesses was relevant, I find that evidence of payment to the witnesses’ law firm is, too. Seeing  
6 as the parties do not dispute that the payments were made for credible work, and this evidence  
7 serves only to further demonstrate the witnesses’ stake in the ultimate outcome of the litigation,  
8 there should be no need for RDF to produce evidence to defend its reputation and the reputation  
9 of its witnesses. I also do not find that this evidence is cumulative, though the plaintiffs are  
10 cautioned that, should this evidence of bias become a significant sideshow at trial, I will not  
11 hesitate to place limitations on Jenkins’s testimony. Therefore, RDF’s motion to exclude  
12 Jenkins’s testimony about the amount paid to Brorby, Crozier & Dobie, P.C. for legal services  
13 provided to RDF and related organizations because it is irrelevant is denied without prejudice.

14 **III. Conclusion**

15 IT IS THEREFORE ORDERED that RDF’s motion in limine [ECF No. 222 (sealed);  
16 ECF No. 253 (unsealed)] is GRANTED in part and DENIED in part as set forth in this order.

17 Dated: September 19, 2024

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20 Cristina D. Silva  
21 United States District Judge  
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